

Memorandum

To: Oregon CZARA File, EPA Headquarters

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From: Don Waye, EPA HQ, NPS Control Branch

Date: June 9, 2014

Subject: Timeline for Oregon's Additional Management Measures for Forestry and Related Documents

Background and Summary:

In spring 2014, Don Waye in EPA HQ's Program Office conducted a paper file search of the historical record as it exists in EPA's CZARA Program Office. The record shows that there was no mention of the need for additional MMs for forestry in Oregon until September 1996. The file also shows that the push for Oregon to include additional MMs for forestry was a direct result of information provided to the federal partners by NMFS, which was working at the time with Oregon to establish the Coastal Salmon Restoration Initiative (CSRI). The final draft Oregon Coastal Nonpoint Program Findings and Conditions from January 1997 includes a requirement for Oregon to establish additional MMs for forestry and recommends that Oregon work with NMFS to address priority issue" identified by NMFS in the development of these additional measures. Rather. In January 1998, the federal partners publicly released the Findings for Oregon Coastal Nonpoint Program which require additional management measures for forestry to address certain areas of concern identified by EPA and NOAA (which are identical to the concerns previously identified by NMFS).

This search has revealed the following documents relevant to the development of Oregon's additional MMs for forestry summarized here in chronological order:

December 2, 1993 – Two page memo with a lengthy set of attachments from Jeff Weber, Oregon DLCD Coastal Program, to John Cannell, EPA HQ labeled "Review of Oregon's Forestry Management Measures". The memo states, "Our inventory of Oregon's Forest Practices Act (FPA) with respect to the Forestry Management Measures is now completed. A copy is attached, along with its attachments." The memo also refers to a follow-up meeting on forestry in January 1994 and Oregon's disinterest in a full threshold review of its preliminary CNPCP.

December 15, 1993 – Letter from Oregon Department of Forestry (DOF) to "Interested Party" transmitting draft rules for water classification and protection (as a 133 page attachment).

January 10, 1994 – Two page letter from Oregon DOF to "Interested Party" announcing a comment period for proposed rules under the FPA, with the comment period ending on Feb. 28, 1994.

February 1, 1994 – Lengthy memo from ODOF staff (Keith Mills) to EPA HQ staff (John Cannell) labeled “Oregon Forest Practices and (G) Management Measures” to discuss how the FPA might fit the 6217(g) measures for forestry. Additional management measures are not discussed. Handwritten notes, presumably by EPA HQ staff, flags exception in Oregon’s FPA for abandoned roads constructed prior to 1972 with the word “stabilized?”.

February 24, 1994 – Two page memo from Ann Beier to John Cannell (both with EPA HQ) labeled “Comments on Oregon’s package” specific to forestry containing a list of questions for Oregon about its preliminary forestry submittal.

February 28, 1994 – Eight page memo from EPA HQ (Jon Cannell) to ODOF (Ted Lorensen) conveying “preliminary and partial review” comments from NOAA and EPA on the Oregon Forest Practices Act and the CZARA management measures for forestry. Numerous issues and questions are raised, but additional management measures are not proposed.

Comment #1) “The Management measure for Preharvest Planning contains components for locating landings to avoid steep slopes and within Streamside Management Areas. Additional discussion or clarification of how the proposed rules will address these components is needed.”

Comment #2) “The Applicability section for the Management measure for Streamside Management Areas states that SMAs should be established for all perennial waterbodies and for intermittent streams that are plowing at the time of operations. It is not clear that the proposed rules... will adequately consider and address intermittent streams. Clarification and additional discussion... would be useful.”

March 4, 1994 – Memo from Jeff Weber, Oregon DLCD, Oregon Coastal Program, conveying Oregon’s “Coastal Nonpoint Pollution Control Program: Inventory of Existing Laws, Programs, and Authorities.” The memo notes “the entire inventory, including appendices, is a six inch stack of paper.”

April 8, 1994 – Lengthy “Report on the Evaluation of Public Comments Received About Draft Water Classification and Protection Rules” from Oregon DOF

April 12, 1994 – Letter from Oregon DLCD and Oregon DEQ to NOAA and EPA requesting a Threshold Review of Oregon’s preliminary CNPCP for August 1994.

April 28, 1994 – Two page memo from John Cannell to Geoff Grubbs and Dov Weitman (all 3 from EPA HQ) labeled “CZARA Review for Ongoing Oregon Forest Practices Act Revision.” While additional management measures for forestry were not addressed, one of the “additional issues” identified was inadequate protection of small streams under the Streamside Management Area 6217(g) management measure.

May 24, 1994 – Two short memos from John Cannell to Dov Weitman (first memo) and to NOAA/EPA program staff labeled “Draft Comments on Oregon Forest Practices Act for Achieving S. 6217 Management Measures for Forestry” conveying 8 page attachments of review comments. Dov Weitman’s handwritten margin notes are also provided. P. 2 of the attachment discusses additional management measures for forestry in the context of the extent to which Oregon has a process for developing additional MMs for forestry on its own. A number of issues are flagged for many of the Forestry MMs.

July 20, 1994 – Two pages of handwritten notes from discussion between John Cannell (EPA HQ), Patty Dornbusch (NOAA OCRM) and Bill Milhouser (NOAA OCRM) on Oregon's Forest Practices Act and the 6217(g) measures.

July 21 (1994) – Draft memo (2 pages) from NOAA/EPA program staff to Oregon DLCD/DEQ/DOF program staff labeled "Review of the Oregon Forest Practices Act and Nonpoint Source Controls for Achievement of the Section 6217 Management Measures for Forestry" and attachment (8 pages) titled "EPA and NOAA Review Comments on Oregon Forest Practices Act."

p. 2: Concludes that "Based on our preliminary review, we believe that the Oregon Forest Practices Act provides a sound basis for the development and implementation of the CZARA forestry management measures." Additional management measures are discussed on p. 2 of an attachment merely to note that Oregon appears to have a process to determine the need for additional management measures.

August 16-18, 1994 – EPA and NOAA visit Portland and Newport, Oregon to conduct a 3-day Threshold Review of Oregon's preliminary CNPCP under CZARA/6217. Forestry management measures and Oregon's Forest Practices Act are discussed, as are Oregon's process for considering the need for additional management measures for forestry.

Nov. 4, 1994 – Draft memo from NOAA titled "Attorney Work Product / Do Not Release / Draft Informal Discussion Memorandum / 6217 program Issues", 7 pages. Memo is Q & A format; most questions concern boundary issues, a few questions are ESA-related, a couple questions deal with coordination between state agencies and federal agencies, and a couple questions concern protection of salmonids and support for NMFS salmon recovery efforts. No question pertains to federal imposition of additional management measures; the phrase "additional management measure" is absent from this legal memo.

Dec. 30, 1994 – Letter and report from NOAA/EPA to Oregon conveying results of Aug. 1994 Threshold Review of Oregon's initial draft CNPCP.

P. 3: "NOAA and EPA must consult with the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) under the Endangered Species act in the process of reviewing State coastal nonpoint programs. NOAA and EPA are in the process of working out the details of this consultation process and will keep the State informed of its status."

p. 20: "Additional Management Measures" section discusses how Oregon's Forest Practices Act can be used by the state to develop additional management measures on its own, but no specific additional MMs are imposed or suggested by EPA/NOAA.

p. 21: "The State also refers to the Tualatin River and Bear Creek as areas where additional management measures [for forestry] are under review and development. Can the State describe the process that has been used to develop and implement such additional management measures?"

July 19, 1995 – Oregon DLCD & DEQ letter to NOAA/EPA transmitting submittal of Oregon's CNPCP.

Feb. 7, 1996 – "Final Draft" letter from NOAA/EPA (signed by 2 of 3 signatories) to Oregon conveying draft findings and conditions for Oregon's CNPCP. Includes no mention of Additional Management Measures for Forestry.

March 5, 1996 – Memo from Oregon DLCD/DEQ to NOAA/EPA summarizing concerns and questions on the draft 6217 findings. Concerns raised about many different management measures, but Forestry concerns are not included.

March 11-12, 1996 – Typed notes from conference calls on those days outlining areas of discussion. Ag, Urban, OSDS, Marinas, Hydromod and other topics were discussed; however, Forestry was not discussed.

September 12, 1996—Draft Final “Oregon Coastal Nonpoint Program Findings and Conditions”, 19 pages, including the following passages (bolded statements appear bolded in the original):

p. 5 (Forestry section): **“Although Oregon does have the basic legal and programmatic tools to implement a forestry program in conformity with Section 6217, these tools have not been fully effective in ensuring water quality standards are attained and maintained and beneficial uses protected. Oregon waters currently experience significant impacts from forestry...”**

p. 5 (cont.): **“Section 6217 recognizes that implementation of the (g) measures alone may not always be adequate to protect coastal waters from nonpoint sources of pollution. In these cases, Section 6217 requires the identification and implementation of additional management measures. Thus, Oregon will need to adopt additional management measures for forestry in areas adjacent to coastal waters not attaining or maintaining applicable water quality standards or protecting beneficial uses, or that are threatened by reasonably foreseeable increases in pollutant loadings from new or expanding forestry operations (see Section X, pages 16-18).”**

p. 16: **“Condition: Within two years, Oregon will develop a process for the identification of critical coastal areas and a process for developing and revising management measures to be applied in critical coastal areas and in areas where necessary to attain and maintain water quality standards. Within one year, the state will identify and begin applying additional management measures where water quality impairments and degradation of beneficial uses attributable to forestry and confined animal facilities exist despite implementation of the (g) measures.”**

p. 17 (from the rationale for the above condition): **“...The State is currently engaged with NMFS in developing a Coastal Salmon Restoration Initiative (CSRI) to preserve and restore native coastal salmon populations and prevent the need for a federal threatened or endangered listing of coho salmon under the Endangered Species Act (ESA). NFMFS has identified a number of concerns with the State’s existing forestry and confined animal facility programs that relate to the ability of these programs to adequately protect and maintain essential features of habitat for proposed or listed anadromous salmonids. In developing a process for the identification of critical coastal areas and for developing and revising additional management measures to be applied in critical coastal areas, the State needs to consider the issues raised by NMFS and how these provisions of the coastal nonpoint program can interface with and enhance the CSRI.”**

“The State should work with NMFS in the identification of critical coastal areas. As NMFS has described in other documents, such areas might include:” A descriptive list of such areas follows; e.g., **“Key spawning, rearing and migratory habitats of listed anadromous salmonids”**.

“In addition, Oregon needs to develop and implement additional management measures for forestry and confined animal facilities immediately. ...in discussions with the State, NMFS has identified areas of concern with the existing forest practices program, where current practices may be contributing to violation of water quality standards and nonattainment of beneficial uses. These issues are mass wasting, legacy road maintenance, small stream protection, hydrologic changes, cumulative effects, and inadequate long-term wood recruitment to streams. NMFS has developed recommendations that could form the basis of additional management measures for each of these issues.”

September 25, 1996 – NOAA/EPA draft proposed findings of Oregon’s CNPCP sent to ODLCD/ODEQ (missing from EPA HQ files, but referenced in NOAA/EPA letter of Dec. 20, 1996). Evidently contains specific additions for additional management measures for forestry, representing the first time the state had seen them.

October 7, 1996 – Strongly worded letter from Oregon Dept of Forestry (State Forester James Brown) to NOAA/EPA complaining about “erroneous information about the Oregon Forest Practices Act which NMFS staff provided for these proposed findings.” Letter contains strongly worded point-by-point dispute of language from NOAA/EPA proposed findings document.

pp. 6-7: “We are very concerned that these “last minute” changes to the proposed findings were undertaken without communication or discussion with the department. It appears that these changes are the result of advocacy by the NMFS staff to ensure that EPA’s findings support positions previously taken or actions planned by NMFS. It is our belief that several of the positions taken by the NMFS are not supportable by scientific monitoring evidence and reflect an agenda inconsistent with their agency’s charge under the federal ESA. The Department of Forestry recommends that EPA take the following specific actions with regard to the finding: (1) Eliminate the findings that additional Management measures are needed. The underlying basis and logic supporting this finding are severely flawed...”

October 11, 1996 – Strongly worded letter from Oregon Forest Industries Council to Will Stelle, NW Regional Director of NMFS “shares the concerns expressed by the State Forester in his attached October 7, 1996, letter” to NOAA/EPA. “We have been concerned and annoyed for a number of months with what appears to be a negative bias on the part of the national Marine Fisheries Service staff, unsupported by objective data, toward the Oregon Forest Protection Act. The issues of water quality and anadromous salmonid recovery are complicated enough to address without interjecting misinformation and poor staff work into the process.”

October 30, 1996—Fax memo to NOAA and EPA Region 10 program staff with a draft response to Oregon State Forester’s letter to NOAA/EPA. The draft response includes handwritten comments from Dov Weitman (EPA HQ’s NPS Branch Chief).

Nov. 1, 1996—A 3-page typed note from Dov Weitman (EPA HQ’s NPS Branch Chief) to Patty Dornbusch (NOAA/OCRM) with explicit directions and advice on edits to a draft letter to Oregon ODF. A few of Dov’s comments:

- *I’m concerned that the bottom of page 2 of your draft sounds as if we relied entirely on what NMFS told us. I would, instead, recite in a paragraph or 2 what the “scientific information” is that we relied on.*

- *I also would not refer back to our threshold review findings... but rather articulate why we think they must develop additional MM to address stream protection, road management and forest chemical management. I also wonder whether we are getting too specific here re what the additional MM will need to address.*

November 6, 1996 – Letter from Will Stelle, NMFS, to James Brown, Oregon State Forester in response to Mr. Brown’s letter of Oct. 7 letter to NOAA and EPA. “I find the substance and tone of the letter very disappointing, and would have hoped for something better, particularly in light of the constructive collaboration that we are trying so hard to build with Governor Kitzhaber and others in the State of Oregon. I do not believe it particularly useful at this juncture to respond to your pejorative comments, and will refrain from doing so except to note my strong opposition to them.”

November 7, 1996 – Letter from Will Stelle, NMFS, to Oregon Forest Industries Council in response to OFIC’s letter of Oct. 11, 1996. “As for the “misinformation and poor staff work” that you assert, I urge you to consider my letter to Oregon State Forester Jim Brown (enclosed). My staff presented the best information available to them and remains open to reviewing professional critiques of the substance of what they have presented. To date, they have not been offered such an opportunity.”

Nov. 22, 1996 – Lengthy comment letter from the Coast Range Association to NOAA/EPA critical of the FPA and supportive of EPA/NOAA draft findings on the additional MMs for forestry. Cites scientific literature prepared for ODOF.

December 20, 1996 – Letter with 6-page attachment from NOAA (OCRM Director)/EPA (Headquarters AWP Director & R10 Office of Ecosystems and Communities Director) to Oregon State Forester James Brown “in response to your letter of October 7, 1996, regarding the draft Oregon Coastal Nonpoint Program... Proposed Findings and Conditions.”

“These draft findings are the result of careful review by [NOAA/OCRM and EPA]. In recognition of the shared goals of the Oregon Coastal Salmon Restoration Initiative (CSRI) and the section 6217 program, and due to the Endangered Species Act (ESA) issues involved, staff from our offices worked closely with NOAA’s National Marine fisheries Service (NMFS) staff in preparing the draft findings. That coordination included extensive discussion to ensure that the draft findings were based upon the best available information, and that policy statements issued by EPA, NMFS, and OCRM were not in conflict with each other.”

“...In this light, the September 25, 1996, draft of our proposed findings were sent to DLCD and DEQ, and those lead agencies were encouraged in turn to share the draft findings with the other affected agencies, precisely because the draft findings contained significant changes from the February 16, 1996, draft the state had reviewed previously, and we felt strongly that the state should have a chance to comment on the second draft findings. We have carefully considered your comments, and the attachment to this letter contains our response to those comments.”

“In order to move forward with the approval process for the Oregon coastal nonpoint program, NOAA and EPA will soon publish a Notice of Availability of the draft findings and the accompanying environmental assessment (EA) developed in compliance with the National Environmental Policy Act (NEPA). The Notice will allow for a 30-day public comment period. After considering any comments, NOAA and EPA will issue final findings on the Oregon program early next year.”

The 6-page attachment contains a point-by-point response to the Oct. 7 letter from the Oregon State Forester.

January 29, 1997—Oregon Coastal Nonpoint Program Findings and Conditions, Final Draft (19 pages). No specific additional management measures are imposed on Oregon by EPA/NOAA, but there is much language stating that additional MMs are needed for forestry. Forestry section is similar to Sept. 12, 1996 version except references to NMFS are pared back and the section is more tightly written. One of the remaining references to NMFS in this section states: “The National Marine Fisheries Service (NMFS), in reviewing the Oregon FPA and its implementing rules and the Oregon 6217 program submittal as part of the State’s Coastal Salmon Recovery Initiative (CSRI), raised a number of issues related to Oregon’s existing forestry program. The State should address these as priority issues in its development of additional management measures. See the additional measures at Section X, pages 16-18.”

Pp. 16-18 (Section X. Critical Coastal Areas, Additional Management Measures and Technical Assistance) describe the state’s involvement with NMFS on the CSRI and states that Oregon needs to identify critical coastal areas, and suggests that they work with NMFS. P. 17: “As NMFS has described to the State in other documents, such areas might include:” (3 specific suggestions follow).

“Within two years, Oregon will identify and begin applying additional management measures for forestry. ...In order to determine the types of activities to which additional management measures need to be applied, the State should monitor the effectiveness of specific forest management practices in controlling adverse impacts to water quality. ...The State should work closely with NMFS in assessing the FPA and its implementing rules and the need for additional measures.”

From p. 17: “NMFS has identified areas where existing practices under the FPA may be contributing to violation of water quality standards and nonattainment of beneficial uses. For example, under the existing State forestry program, small and medium fishbearing streams and small nonfishbearing streams, including intermittent streams, may not be adequately protected from potential sediment delivery and temperature changes. Inadequate long-term large woody debris (LWD), due to inadequate riparian width prescriptions, would result in less storage of fine sediment in smaller tributaries, and increased transport and deposition of fine sediment in downstream salmon spawning and rearing habitats.”

Also from p. 17: “Roads constructed prior to the adoption of the FPA in 1972 were not required to be treated and stabilized before closure. In some locations, this has resulted in significantly altered surface drainage, diversion of water from natural channels, and serious erosion or landslides. In addition, under the existing rules, there is no requirement that a road be “vacated.” The ODF has proposed an expedited voluntary program to upgrade roads built prior to 1974, which will be supplemented with additional management measures if evaluation of sediment contributions from existing roads (including abandoned and vacated roads) shows that such measures are needed coastwide or within certain basins and watersheds.”

“Existing forest practices rules also do not require buffers for aerial application of chemicals for type N (nonfishbearing) streams. Such streams comprise as much as 80 percent of total stream length in the coastal zone...”

“In addition, NMFS raised concerns regarding the effectiveness of the FPA program to address the issues of mass wasting (landslides), hydrologic changes, cumulative effects, long-term wood recruitment to streams, and protection of small streams. While some of these measures are less

directly related to the (g) measures, NMFS has developed recommendations that could form the basis of additional management measures for each of these issues.”

March 12, 1997—Comment letter from Dan Newton, Lone Rock Timber Co. to EPA Region 10 objecting to recommendations for additional management measures for forestry. Concludes with “Please don’t burden the tree growers with more obstacles to forestry unless you can demonstrate that we have caused a problem and that the proposed solution will be effective and efficient.”

March 13, 1997—Eight page comment letter from Boise Cascade objecting to the need for additional MMs for forestry.

January 13, 1998—Findings for Oregon Coastal Nonpoint Program released publicly, which require additional management measures for forestry to address certain areas of concern identified by EPA and NOAA: <http://coastalmanagement.noaa.gov/nonpoint/docs/findor.txt>

“Within two years, Oregon will identify and begin applying additional management measures where water quality impairments and degradation of beneficial uses attributable to forestry exist despite implementation of the (g) measures.”

“EPA and NOAA have identified areas where existing practices under the FPA and FPR should be strengthened to attain water quality standards and fully support beneficial uses. These areas include protection of medium, small, and non-fish bearing streams, including intermittent streams; protection of areas at high risk for landslides; the ability of forest practices to address cumulative impacts of forestry activities; road density and maintenance, particularly on so-called “legacy” roads; and the adequacy of stream buffers for application of certain chemicals.”